

Spring 2005

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Recommended Citation

Nicholas G. Green, A "Blank Check": Judicial Review and the War Powers in Hamdi v. Rumsfeld, 56 S. C. L. Rev. 581 (2004).

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A "BLANK CHECK": JUDICIAL REVIEW AND THE WAR POWERS IN *HAMDI V. RUMSFELD*

I. INTRODUCTION

The September 11th terrorist attacks compelled this nation to respond to its enemies with military force. This "war on terror" presents important and challenging legal questions. The potential for a subversive attack on American soil and the possibility of United States citizens acting as terrorists raise constitutional issues not previously encountered. In 2004, the Supreme Court addressed initial questions arising from the war on terror in three cases.¹ These cases dealt with the rights of both citizens and non-citizens detained as a result of the war in Afghanistan and domestic counter-terrorism operations. In particular, *Hamdi v. Rumsfeld* has significant implications for the impact of the war on terror on Americans' civil liberties. The Court in *Hamdi* also provided guidance on the judiciary's role in the war on terror.² Historically, the Court has been reluctant to exercise judicial review³ during times of war and has deferred to the Executive or deemed cases non-justiciable political questions.⁴ *Hamdi* attempts to explain how the Court will use judicial review during the current war.

In *Hamdi*, the Court found constitutional authority for the government to detain American citizens as "enemy combatants," subject to the requirements of due process.⁵ One of the nation's newspapers lauded the Court for affirming "the principle that the president cannot suspend the rule of law during wartime and simply lock people away."⁶ Many other newspapers similarly agreed with the Supreme Court's apparent assertion of judicial review.⁷ However, these newspapers failed to fully understand the practical effects of the Court's decision in *Hamdi*.

1. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004); *Rasul v. Bush*, 124 S. Ct. 2686 (2004); *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004).

2. See *Hamdi*, 124 S. Ct. at 2649–51.

3. As used in this Note, the term "judicial review" means "[a] court's power to review the actions of other branches or levels of government; esp., the courts' power to invalidate legislative and executive actions as being unconstitutional." BLACK'S LAW DICTIONARY 852 (7th ed. 1999).

4. See John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 182–86 (1996).

5. *Hamdi*, 124 S. Ct. at 2640, 2648.

6. Editorial, *No Blank Check*, ST. LOUIS POST-DISPATCH, June 29, 2004, Five Star Late Lift ed., available at LEXIS, NEWS Library Slpd File.

7. See, e.g., Editorial, *Enemy Combatants; High Point for High Court*, PHILA. INQUIRER, June 29, 2004, at A18, available at 2004 WL 84019484 (discussing the need for judicial review in light of the Abu Ghraib prison abuse scandal); Editorial, *Supreme Rebuke*, WASH. POST, June 29, 2004, at A22, available at LEXIS, NEWS Library wpost File (stating that the Court's decision "sends a powerful message that Americans cannot just disappear at the hands of their government"). But see *Supreme Foolishness*, N.Y. POST, June 29, 2004, at 28, available at LEXIS, NEWS Library Nypost File (arguing that the Court's decision does not "realize that the War on Terror is a different kind of war" requiring the actions of a strong executive branch).

In *Hamdi*, the Supreme Court made strong statements supporting the exercise of judicial review over the war powers, specifically when the exercise of such powers infringes on the individual rights of United States citizens. This Note argues that, despite the Court's apparent support of judicial review, the practical effect of its decision grants broad deference to the political branches' use of their war powers. By declaring in this case that a role for judicial review exists, the Court leaves a superficial impression of limiting the President's use of the war powers. The decision instead continues the traditional deference and does little to limit the President's ability to detain citizens under the war powers. The Court contradicts its apparent support for judicial power by showing deference to the political branches' war powers in three ways: 1) interpreting 18 U.S.C. § 4001(a) broadly, 2) relying on *Ex parte Quirin* and broadly construing its precedential value, and 3) establishing a due process regime that strongly favors the government.

Part II of this Note discusses the background and reasoning of the Supreme Court decision in *Hamdi*. Part III examines *Hamdi*'s place in the war powers jurisprudence, particularly in relation to the Court's history of deference to the political branches' exercise of the war powers, and then discusses three of the Court's holdings and how each defers to the war powers. Part IV analyzes the Court's construction of 18 U.S.C. § 4001(a) and argues that the Court's decision to interpret that statute broadly, when a stronger, narrower interpretation exists, shows deference to the Executive. Part V argues that the Court's reliance on *Ex parte Quirin* demonstrates deference to the war powers by amplifying that case's precedential value and embellishing its holding. Finally, Part VI discusses the Court's interpretation of due process requirements in *Hamdi* and contends that the due process regime the Court recommended provides only nominal protection for citizens seeking to challenge their detention.

II. BACKGROUND OF *HAMDI*

A. Facts

On September 18, 2001, Congress passed an Authorization for Use of Military Force.⁸ This simple statement provided authorization for the President to use "all necessary and appropriate force against those nations, organizations, or persons he determines" were involved in the September 11th terrorist attacks.⁹ The Act also

8. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

9. *Id.* § 2(a) states:

That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

provided authority to take action against any nation harboring terrorists or terrorist organizations.¹⁰ Pursuant to this authorization, the President initiated military force in Afghanistan against the Taliban government and al Qaeda, an important terrorist organization with operations in the country.¹¹

The Northern Alliance, a military organization fighting against the Taliban government, captured Yaser Esam Hamdi in Afghanistan in 2001.¹² Hamdi was an American citizen born in Louisiana.¹³ The Northern Alliance subsequently transferred Hamdi to the United States military, who, after interrogating Hamdi, determined he was associated with the Taliban and classified him as an "enemy combatant."¹⁴ These determinations led the military to believe Hamdi required further detention.¹⁵ The government initially detained Hamdi at Guantanamo Bay, Cuba, but later transferred him to naval brig in Virginia and South Carolina after learning he was a United States citizen.¹⁶ The government placed Hamdi in solitary confinement, and a civilian court or military tribunal never evaluated his detention.¹⁷

B. Procedural History

Hamdi's father initiated a next-friend petition for a writ of habeas corpus in federal district court in June 2002.¹⁸ The district court initially ordered the government to provide Hamdi with access to legal counsel, but the Fourth Circuit reversed the order in deference to the "government's security and intelligence interests."¹⁹ When the Fourth Circuit remanded the case to the district court, the government moved to dismiss the petition.²⁰ In support of its motion, the government provided a declaration from Michael Mobbs, Special Advisor to the Undersecretary for Defense Policy.²¹ Mobbs stated that he was "'substantially involved'" with both the detention of enemy combatants and military operations against al Qaeda.²² The so-called "Mobbs Declaration" outlined the factual circumstances supporting Hamdi's capture and the government's enemy combatant

10. *Id.*

11. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2635 (2004).

12. *Id.*

13. *Id.*

14. *Id.* at 2635–36. Brief for the Respondents at 4–5, *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004) (No. 03-6696).

15. Brief for the Respondents at 5, *Hamdi* (No. 03-6696).

16. *Hamdi*, 124 S. Ct. at 2636.

17. Brief for Petitioners at 6–7, *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004) (No. 03-6696).

18. *Hamdi*, 124 S. Ct. at 2636.

19. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2636 (2004).

20. *Id.*

21. *Id.* at 2636–37.

22. *Id.* at 2637.

classification.²³ Mobbs, however, was not present at Hamdi's capture or interrogation.²⁴

Before the district court proceeded on the government's motion to dismiss, the Fourth Circuit ordered it "to [first] consider the sufficiency of the Mobbs Declaration"²⁵ The district court found the Mobbs Declaration insufficient to provide the sole basis for detention because it was "little more than the government 'say-so.'"²⁶ The district court also ordered the government to produce more evidence to support Hamdi's detention.²⁷ The court concluded that more information was necessary to facilitate "meaningful judicial review."²⁸

Reversing the lower court, the Fourth Circuit held the Mobbs Declaration sufficient to support Hamdi's classification and detention.²⁹ Citing the history of judicial deference to the political branches during wartime,³⁰ the Fourth Circuit held that "[a]sking the executive to provide more detailed factual assertions would be to wade further into the conduct of war than we consider appropriate and is unnecessary to a meaningful judicial review of this question."³¹ Because, according to the court, Hamdi's detention derived from the political branches' war powers, separation of powers prevented the judiciary from going beyond the government's factual allegation.³² Thus, the factual allegations in the Mobbs Declaration were sufficient to provide a basis for Hamdi's detention.³³

The Fourth Circuit also addressed Hamdi's argument that 18 U.S.C. § 4001(a) prohibited his detention.³⁴ Section 4001(a) provides that the government cannot detain a United States citizen without authorization by Congressional act.³⁵ Rejecting this argument, the court found that the Authorization for Use of Military Force satisfied the statute's requirement.³⁶

The Fourth Circuit also rejected Hamdi's argument that his United States citizenship precluded the government from holding him as an enemy combatant.³⁷ According to the court, a citizen could be an enemy combatant to the same extent as a non-citizen.³⁸ Citing earlier Supreme Court cases, the Fourth Circuit concluded

23. Brief for the Respondents at 6–7, *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004) (No. 03-6696).

24. *See Hamdi*, 124 S. Ct. at 2637.

25. *Id.*

26. *Hamdi v. Rumsfeld*, 243 F. Supp. 2d 527, 535 (E.D. Va. 2002).

27. *Id.* at 528–29.

28. *Id.* at 532.

29. *Hamdi v. Rumsfeld*, 316 F.3d 450, 472–73 (4th Cir. 2003).

30. *Id.* at 462–64.

31. *Id.* at 473.

32. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2638 (2004).

33. *Hamdi*, 316 F.3d at 473.

34. *Id.* at 467–68.

35. 18 U.S.C. § 4001(a) (1971). Section 4001(a) states "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."

36. *Hamdi*, 316 F.3d at 467.

37. *Hamdi v. Rumsfeld*, 316 F.3d 450, 475 (4th Cir. 2003).

38. *Id.*

“that ‘[c]itizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful.’”³⁹

C. The Supreme Court's Analysis in Hamdi

The Supreme Court took a broader approach to the legal questions in *Hamdi*. While the Fourth Circuit used the narrow question of the Mobbs Declaration's sufficiency as a framework for its decision, the Supreme Court did not limit its analysis to that question. The Court analyzed two major issues: 1) whether the government has the statutory and constitutional power to indefinitely detain an American citizen as an enemy combatant and 2) to what extent due process rights protect a person challenging their enemy combatant status.⁴⁰

1. The Statutory Authority to Detain Citizens

Before reaching the constitutional question, the plurality first considered whether the Authorization for Use of Military Force satisfied § 4001(a). Hamdi argued that Congress adopted the statute to require a specific grant of authority before the government could detain citizens and that a declaration of war, in itself, is not sufficient.⁴¹ Using the Fourth Circuit's reasoning, the Court construed the text of the Authorization to permit the detention of persons associated with the Taliban.⁴² The plurality found that detaining persons engaged in fighting against U.S. forces “is a fundamental incident of waging war” such that the Authorization's “necessary and appropriate” language must encompass their detention.⁴³ A citizen could be engaged in fighting against U.S. forces just as a non-citizen could.⁴⁴

Justice Souter, joined by Justice Ginsburg, disagreed with the plurality's view on this issue.⁴⁵ First, he argued the circumstances of § 4001(a)'s passage demonstrate that Congress intended to require a specific grant of authority.⁴⁶ Congress passed the statute in 1971 to replace the Emergency Detention Act of 1950.⁴⁷ The old detention statute permitted the Attorney General “to detain anyone reasonably thought likely to engage in espionage or sabotage.”⁴⁸ Congress therefore intended § 4001(a) generally to curb the President's power to detain and specifically to prevent the possibility of another internment like those of Japanese Americans

39. *Id.* (quoting *Ex parte Quirin*, 317 U.S. 1, 37 (1942)).

40. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2643 (2004).

41. Brief for Petitioners at 44–45, *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004) (No. 03-6696).

42. *Hamdi*, 124 S. Ct. at 2641.

43. *Id.*

44. *Id.* at 2641–42.

45. *Id.* at 2653 (Souter, J., concurring).

46. *Id.* at 2654.

47. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2654 (2004) (Souter, J., concurring).

48. *Id.*

during World War II.⁴⁹ This history, Justice Souter argued, shows that Congress intended the statute to require an act granting the President specific power to detain American citizens.⁵⁰

Second, Justice Souter reasoned that § 4001(a) was enacted when the Supreme Court subjected wartime limitations on liberty to heightened standards of clarity.⁵¹ As enunciated in *Ex parte Endo*, Congressional enactments during a time of war require interpretation “to allow for the greatest possible accommodation” of liberty.⁵² Congress was aware of this interpretive scheme and therefore realized that clear authorization would be necessary to confer power to detain citizens.⁵³ Finally, Justice Souter argued the lessons of Japanese internment during World War II support requiring specific authority.⁵⁴ Those detentions show the Executive is not well-suited to reconcile liberty with his primary responsibility to maintain security.⁵⁵ Requiring Congress to provide a specific authorization would serve to check the Executive.⁵⁶

The Court qualified the power to detain that the Authorization granted by stating that the Authorization did not permit “indefinite” detention.⁵⁷ Rather, the Authorization only allows the detention of citizens “for the duration of the relevant conflict.”⁵⁸ Indeed, the Court’s explanation of the power to detain is narrowly comparable with the position Justice Thomas supported. Justice Thomas argued that the plurality erroneously relied on irrelevant treaties to qualify the power to detain.⁵⁹ The government, according to Justice Thomas, can detain enemy combatants for as long as the war continues.⁶⁰ Furthermore, Justice Thomas stated the judiciary is “bound by the political branches’ determination that the United States is at war,” which could extend beyond actual fighting.⁶¹ Justice Thomas does not appear to limit the power to detain by any geographical measure.⁶² In contrast, the plurality stated that detention is only appropriate so long as the “relevant conflict” continues.⁶³ The “relevant conflict,” according to the plurality, is not the overall war on terror, but rather, the more narrow conflict in Afghanistan.⁶⁴ The

49. *Id.*

50. *Id.*

51. *Id.* at 2655.

52. *Id.* (quoting *Ex parte Endo*, 323 U.S. 283, 300 (1944)).

53. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2655 (2004).

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 2641.

59. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2679 (2004) (Thomas, J., dissenting).

60. *Id.*

61. *Id.*

62. *See id.*

63. *Id.* at 2641.

64. *Id.* at 2641–42.

Court reasoned that Hamdi's detention is within the time period allowed by the Authorization, because the conflict in Afghanistan is ongoing.⁶⁵

2. *The Constitutional Power to Detain Citizens as "Enemy Combatants"*

The plurality opinion, written by Justice O'Connor,⁶⁶ proceeds from the standpoint that the President and Congress are in agreement on detaining citizens as enemy combatants.⁶⁷ The Court uses the Authorization for Use of Military Force to support this proposition.⁶⁸ This agreement is important for the reasons outlined in Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*.⁶⁹ As Justice Jackson wrote, the President's "authority is at its maximum" when he acts with congressional authority, "for it includes all that he possesses in his own right plus all that Congress can delegate."⁷⁰ The President's actions are usually unconstitutional in this situation only if "the Federal Government as an undivided whole lacks power."⁷¹ By finding authorization for Hamdi's detention in the Authorization for Use of Military Force, the Court did not have to deal with the issue of the allocation of war powers to and among each of the political branches. Therefore, the Court decided the issue in the broadest constitutional sense.⁷²

65. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2642 (2004). This conclusion does not mean the "duration of the relevant conflict" is a clear standard and probably does not end at the cessation of hostilities. *Cf. Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 141 (1948) (holding that the war powers also include the power to remedy the ill-effects of war for so long as those problems persist, which could extend beyond the end of hostilities).

66. Justice O'Connor was joined by Chief Justice Rehnquist, Justice Kennedy, and Justice Breyer. *Hamdi*, 124 S. Ct. at 2635.

67. *Id.* at 2639–40.

68. *Id.* at 2639.

69. 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

70. *Id.* at 635.

71. *Id.* at 636–37.

72. *Hamdi* therefore does not determine whether the President, acting alone, has the power to detain American citizens once they are determined to be enemy combatants. However, as historian Arthur Schlesinger, Jr., argues, the President has gradually assumed the war-making power. ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* viii (1973). According to Schlesinger, the concentration of the war-making power in the Executive "was as much a matter of congressional abdication as of presidential usurpation." *Id.* at ix. Although *Hamdi* and other war powers cases involve situations where the Executive and Congress appear to work in concert, under Schlesinger's thesis, Congress does not exercise any real power, relative to the President, during wartime. *See, e.g., id.* at 58–67 (discussing Lincoln's use of the war powers during the Civil War and Congress' failure to assert itself); *see also Yoo, supra* note 4, at 182 (noting that "Congress as a body has never sought to block executive war-making in the courts."). The *Hamdi* Court's finding that the Authorization for Use of Military Force is sufficient Congressional approval to make the case a federal war powers case, rather than a presidential war powers case, is an act of deference in itself.

The Court clearly stated, “There is no bar to this Nation’s holding one of its own citizens as an enemy combatant.”⁷³ This finding was based solely on *Ex parte Quirin*.⁷⁴

In *Quirin*, the Court upheld the President’s use of a military commission to try a group of Nazi saboteurs captured inside the United States.⁷⁵ The FBI captured the German soldiers in New York and Chicago in 1942.⁷⁶ The government concluded that the group came to the United States on German U-boats with the intent to sabotage domestic war facilities.⁷⁷ The Court upheld as constitutional the President’s decision to try the saboteurs by military commission.⁷⁸ Congress previously provided that military commissions had jurisdiction over those being tried for “offenses against the law of war.”⁷⁹ The President was therefore acting pursuant to Congressional authorization when he set up the military commission.⁸⁰ The Court found the military was trying the petitioners for offenses against the law of war because they were “unlawful belligerents.”⁸¹ A soldier is an unlawful belligerent, as opposed to a lawful belligerent, when he does not wear insignia indicating he is in an enemy military force.⁸² Being an unlawful belligerent is a violation of the law of war and therefore within the jurisdiction of the military commission the President established.⁸³ All six were convicted of violating the laws of war and were executed.⁸⁴

One of the petitioners in *Quirin*, Franz Haupt, was an American citizen.⁸⁵ The Court addressed, in merely one paragraph, the issue of whether citizens could be unlawful belligerents.⁸⁶ The Court stated that citizens who are members of a foreign military and “enter this country bent on hostile acts, are enemy belligerents.”⁸⁷ Based on this precedent, the *Hamdi* Court concluded that no constitutional bar prevents the government from detaining a citizen as an enemy combatant.⁸⁸ Just as a citizen could be an unlawful belligerent, the plurality analogized, a citizen could also be an enemy combatant.

73. *Hamdi*, 124 S. Ct. at 2640.

74. *Ex parte Quirin*, 317 U.S. 1 (1942).

75. *Id.* at 18–20.

76. *Id.* at 21.

77. *Id.*

78. *Id.* at 48.

79. *Id.* at 29.

80. *Ex parte Quirin*, 317 U.S. 1, 28 (1942).

81. *Id.* at 35.

82. *Id.*

83. *Id.* at 36.

84. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2669 (2004).

85. *Ex parte Quirin*, 317 U.S. 1, 20 (1942).

86. *See id.* at 37–38.

87. *Id.* at 38.

88. *Hamdi*, 124 S. Ct. at 2640.

3. *The Due Process Requirements*

The parties presented wildly different arguments on the existence and meaning of procedural due process requirements in situations involving the detention of citizens as enemy combatants. The government argued that the Fourth Circuit provided Hamdi with all of the due process rights to which he was entitled.⁸⁹ Hamdi, however, argued due process required a "proceeding before an independent tribunal" to determine whether his detention had "a basis in fact and a warrant in law."⁹⁰

The government premised its argument on the notion that the separation of powers doctrine limited the judiciary's involvement to determining whether a legal basis existed for the detention, not whether the facts supported Hamdi's classification as an enemy combatant.⁹¹ Conceding that the writ of habeas corpus remains available to citizens detained as enemy combatants, the government argued that judicial inquiry is limited to whether the military has legal authority to detain the person.⁹² The Judiciary simply lacks the "institutional capabilit[y]" to assess the Executive's military judgment on whether a citizen is an enemy combatant, according to the government.⁹³ At a maximum, the government argued the courts are limited to determining whether the Executive has made factual allegations supporting an enemy combatant classification.⁹⁴ Hamdi counterargued that separation of powers does not require such deference to the Executive.⁹⁵ Rather, he argued that the separation of powers doctrine requires strong judicial inquiry in these circumstances to prevent "the collection of power in one branch."⁹⁶ Hamdi also contended that inquiry here comports with the judiciary's basic function.⁹⁷

Recognizing the competing interests, the plurality used the balancing test from *Mathews v. Eldridge*⁹⁸ to determine what the Fifth Amendment required in this case. The *Mathews* balancing test weighs the private interest infringed by the government action "against the Government's asserted interest, 'including the function involved' and the burdens the Government would face in providing greater process."⁹⁹ The test specifically weighs the risk of erroneous detention against the value of additional procedural safeguards.¹⁰⁰ The Court preferred to use this test because of its consideration of the competing interests at stake.

89. Brief for the Respondents at 47, *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004) (No. 03-6696).

90. Brief for Petitioners at 15-16, *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004) (No. 03-6696).

91. *Hamdi*, 124 S. Ct. at 2645.

92. Brief for the Respondents at 26, *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004) (No. 03-6696).

93. *Id.*

94. *Hamdi*, 124 S. Ct. at 2645.

95. Brief for Petitioners at 24, *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004) (No. 03-6696).

96. *Id.* at 23.

97. Oral Argument at 2, *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004) (No. 03-6696).

98. 424 U.S. 319 (1976).

99. *Hamdi*, 124 S. Ct. at 2646 (quoting *Mathews*, 424 U.S. at 335).

100. *Id.*

The Court proceeded to list Hamdi's private interests and said his "interest in being free from physical detention by [his] own government," is of utmost importance.¹⁰¹ Nobody can doubt the elemental nature of being free from arbitrary detention by the government. Liberty properly defined surely includes the freedom of one's person.¹⁰² The Court went on to say that the circumstances surrounding detention do not lessen one's liberty interest.¹⁰³ The Court recognized that the possibility of a citizen erroneously being denied liberty is a "very real" risk in such circumstances.¹⁰⁴ The plurality also examined the government's interest, which includes the constitutional delegation of war making to the political branches.¹⁰⁵ Finally, the Court noted the government's argument that heightened due process procedures would burden the prosecution of the ongoing war.¹⁰⁶

In applying the *Mathews* test, the Court rejected both parties' due process arguments. It found the risk of erroneous deprivation of liberty too high under the government's proposed procedure.¹⁰⁷ Likewise, the plurality found Hamdi's due process argument overburdensome to the government.¹⁰⁸ The Court stated a citizen-detainee seeking to challenge his enemy combatant status "must receive notice of the factual basis for his classification" and have an "opportunity to rebut the Government's factual assertions before a neutral decisionmaker."¹⁰⁹ However, the nature of this proceeding "may be tailored to alleviate" the burden it places on the government.¹¹⁰ Permissible methods for alleviating the burden are: 1) allowing the admission of hearsay, 2) placing a "presumption in favor of the Government's evidence," and 3) shifting the burden to the petitioner once the government admits credible evidence supporting the classification.¹¹¹ The plurality went on to say a hearing before a military tribunal could meet the due process requirements described.¹¹²

4. *The Assertion of Judicial Power*

At the end of its opinion, the plurality made a significant proclamation of judicial power in this area. "In so holding," the Court stated, "we necessarily reject the Government's assertion that separation of powers principles mandate a heavily

101. Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2646 (2004).

102. Skinner v. Oklahoma, 316 U.S. 535, 544 (1942) (Stone, C.J., concurring).

103. Hamdi, 124 S. Ct. at 2646–47.

104. *Id.* at 2647.

105. *Id.*

106. *Id.* at 2647–48.

107. *Id.* at 2648.

108. Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2648 (2004).

109. *Id.*

110. *Id.* at 2649.

111. *Id.*

112. *Id.* at 2651.

circumscribed role for the courts in such circumstances."¹¹³ The Court criticized the government's separation of powers argument because it would act to accumulate power in one branch. The plurality recognized that the Constitution may not give the judiciary a role in making war, but stated the Constitution "most assuredly envisions a role for all three branches when individual liberties are at stake."¹¹⁴ Accordingly, checks and balances necessarily include the right of a citizen to contest his detention by the government.¹¹⁵ In a sweeping statement, Justice O'Connor wrote that "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."¹¹⁶

III. *HAMDI'S* SUPPORT OF JUDICIAL REVIEW IS INCONSISTENT WITH THE PRECEDENT

Hamdi is part of a deferential jurisprudence giving broad power and wide discretion to the political branches during a time of war. The Court has traditionally given the political branches, particularly the Executive, the expansive power necessary to wage and win war. The Court views *Hamdi's* detention as an exercise of a war powers. By stating its support of judicial review over the exercise of the war powers involved in *Hamdi*, the Court makes a rare assertion of judicial power in the war making process, contradicting a long history of judicial abstention. Although the Court challenges earlier war powers decisions with its support of judicial review, its practical effect ultimately follows the long-standing tradition of deference.

A. *The Court Analyzes Hamdi as a War Powers Case*

The Court analyzed *Hamdi's* detention as an exercise of the President's war powers. Furthermore, the Court seems to recognize the Authorization for Use of Military Force as a declaration of war, at least in determining that a state of war existed with the Taliban.¹¹⁷ The Court also recognized the necessity of detaining enemy forces as "an incident to war."¹¹⁸ The recognition that a state of war exists is significant in providing the political branches the powers necessary "to wage war successfully."¹¹⁹ More precisely stated, the war powers give the political branches free will in choosing the means of conducting war.¹²⁰ Indeed, Congress has the

113. *Id.* at 2650.

114. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2650 (2004) (citing *Mistretta v. United States*, 488 U.S. 361, 380 (1989) and *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U.S. 398, 426 (1934)).

115. *Id.*

116. *Id.* (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952)).

117. *Cf. Montoya v. United States*, 180 U.S. 261, 267 (1901) (stating that a declaration of war serves to place two nations in a state of war).

118. *Hamdi*, 124 S. Ct. at 2640.

119. *Hirabayashi v. United States*, 320 U.S. 81, 93 (1943).

120. *Id.*

broad power to do all that is necessary and proper to conduct the war.¹²¹ The Executive likewise enjoys wide discretion in his role as Commander-in-Chief of the nation's military and in his duty to faithfully execute the laws.¹²² Thus, the Court decided *Hamdi* within a traditional framework of deference to the political branches, particularly the Executive.

B. *A Tradition of Deference to the War Powers*

The Supreme Court has traditionally shown the President great respect in the exercise of the war powers by choosing not to interfere with his decisions in conducting a war. The *Prize Cases* remain the major statement on the President's power to defend the nation from hostile enemies.¹²³ These cases dealt with four ships captured for violating a blockade that President Lincoln instituted following the attack on Fort Sumter.¹²⁴ The Court addressed the issue of whether the President, absent a formal declaration of war, could blockade Southern ports to suppress the rebellion.¹²⁵ It overwhelmingly found the President had the power to institute the blockade.¹²⁶

Finding a duty to defend the country, the Court stated that "the President is not only authorized but bound to resist force by force."¹²⁷ A war, particularly in the case of rebellion, can exist without a formal declaration of war.¹²⁸ Just as important, the President—and the President alone—has the power to determine what force is necessary to defend the country.¹²⁹ The Court is bound by the President's "decisions and acts," because the Constitution gave him this authority.¹³⁰ The Court went so far as to say congressional after-the-fact ratification of a President's encroachment on the legislative war powers works "to perfectly cure the defect."¹³¹

The Court also has shown deference to the President when he acts in the area of foreign affairs. In *United States v. Curtiss-Wright Export Corp.*,¹³² Justice Sutherland, writing for the majority, acknowledged the "very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations."¹³³ The ability to act in foreign affairs is an attribute

121. *Stewart v. Kahn*, 78 U.S. (11 Wall.) 493, 506–07 (1870).

122. *Johnson v. Eisentrager*, 339 U.S. 763, 788 (1950). *But see* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (stating the Commander-in-Chief power does not include the ability to control private property for war production).

123. *Prize Cases*, 67 U.S. (2 Black) 635 (1862).

124. *Id.* at 636–40.

125. *Id.* at 643–44.

126. *Id.* at 671.

127. *Id.* at 668.

128. *Id.* at 666–67.

129. *Prize Cases*, 67 U.S. (2 Black) 635, 670 (1863).

130. *Id.*

131. *Id.* at 670–71.

132. 299 U.S. 304 (1936).

133. *Id.* at 320.

of national sovereignty, according to Justice Sutherland, and is vested solely in the President as a result of the other branches' inherent limitations.¹³⁴ *Curtiss-Wright* involved the President's imposition, pursuant to congressional authorization, of an arms embargo against certain South American countries.¹³⁵ The Court upheld as constitutional the appellant's conviction for violating the embargo.¹³⁶ While *Curtiss-Wright* is open to criticism,¹³⁷ Justice Sutherland's opinion undoubtedly shows deference to the Executive's foreign affairs authority, which encompasses a number of war-related activities, including engaging in conflict diplomacy and dealing with foreign hostilities.

The Court's reluctance to review the President's use of the war powers continued into the Vietnam War. The Supreme Court refused to decide challenges to the war's constitutionality. For example, the Supreme Court, denying certiorari in *Mora v. McNamara*, refused to hear the petitioners' challenge to the legality of the Vietnam War.¹³⁸ The Court similarly refused to consider the war's unconstitutionality in *Mitchell v. United States*.¹³⁹ By failing to reach the merits, the Court refused to assert judicial review in these cases and again showed great deference to the Executive. The *Prize Cases*, *Curtiss-Wright*, and the Vietnam-era cases demonstrate the Court's willingness to give the President great authority in the exercise of the war powers.¹⁴⁰

C. Deference and the Power to Detain Citizens

The Court has extended its refusal to exercise judicial review in the war powers area to the President's power to detain U.S. citizens. In *Ex parte Merryman*, President Lincoln claimed his war powers included the right to suspend the writ of habeas corpus at the onset of the Civil War.¹⁴¹ The President had already disobeyed an order to bring a detained citizen before the court.¹⁴² Chief Justice Taney, sitting as a circuit judge, stated that Congress, not the President, held the power to suspend the writ of habeas corpus.¹⁴³ However, he concluded the courts were unable to

134. *Id.* at 315–21.

135. *Id.* at 312–13.

136. *Id.* at 333.

137. See Michael J. Glennon, *Two Views of Presidential Foreign Affairs Power: Little v. Barreme or Curtiss-Wright?*, 13 YALE J. INT'L L. 5 (1988).

138. *Mora v. McNamara*, 389 U.S. 934 (1967).

139. 386 U.S. 972 (1967).

140. Judicial abdication when the government asserts its "war powers" is dangerous. As stated in *Federalist No. 51*, the distribution of power among the various branches of governments serves to protect the rights of the people. THE FEDERALIST NO. 51, at 333 (James Madison or Alexander Hamilton) (Robert Scigliano ed., 2000). "Ambition must be made to counteract ambition." *Id.* at 331. The judiciary, with regard to the war powers, seems to lack ambition to curb the political branches', specifically the President's, assumption of power during wartime.

141. *Ex parte Merryman*, 17 F. Cas. 144, 148 (C.C.D. Md. 1861) (No. 9,487).

142. *Id.* at 147.

143. *Id.* at 148.

compel the President's obedience.¹⁴⁴ Chief Justice Taney stated the judiciary's power is limited relative to the President's power, which he described as "a force too strong . . . to overcome."¹⁴⁵ The federal judiciary has no inherent ability to compel the President's submission to its decisions.¹⁴⁶ Chief Justice Taney therefore recognized that the limitations on judicial power create a *de facto* power to detain citizens.

The Court again deferred to the use of the war powers to detain citizens in *Hirabayashi v. United States*¹⁴⁷ and *Korematsu v. United States*.¹⁴⁸ Both cases challenged the constitutionality of Japanese internment during World War II. The President promulgated a military order authorizing the internment, which Congress subsequently ratified.¹⁴⁹ Because of the congressional ratification, the Court determined that the sole issue was whether the Congress and President could implement Japanese internment measures pursuant to their war powers, or, in other words, whether the measure was a valid exercise of the federal war powers.¹⁵⁰ The Court, noting that the war powers "[are] 'the power to wage war successfully,'" deferred to the political branches' determination that the internment scheme was an appropriate response to the possibility of Japanese subversive attacks.¹⁵¹ The Court upheld a similar military order in *Korematsu*, where the petitioner (also an American citizen) challenged a military order excluding him from a particular area which included his home.¹⁵² The Court upheld the order despite its "obvious purpose" to place Japanese Americans in internment camps.¹⁵³ As in *Hirabayashi*, the Court deferred to the military judgment that detention was necessary to prevent espionage and sabotage.¹⁵⁴

In summation, the Judiciary has traditionally refused to usurp the President's decisions on how best to execute a war. Further, as demonstrated by *Merryman*, the Judiciary would be powerless to enforce a decision that declared an exercise of the

144. *Id.* at 153.

145. *Id.*

146. *See id.* Alexander Hamilton similarly recognized the Judiciary's inherent weakness relative to the Executive and Congress in *Federalist No. 78*. Separation of powers, Hamilton argued, delegated appreciably more power to the political branches. THE FEDERALIST NO. 78, at 496 (Alexander Hamilton) (Robert Scigliano ed., 2000). The Executive controls the military, while Congress controls the purse. *Id.* The Judiciary, by contrast, has "neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm for the efficacious exercise of this faculty." *Id.* A lack of innate power means the Judiciary "can never attack with success either of the other two [branches]." *Id.* at 496-97.

147. 320 U.S. 81 (1943).

148. 323 U.S. 214 (1944).

149. *Hirabayashi*, 320 U.S. at 85-88.

150. *Id.* at 91-92.

151. *Id.* at 93, 98-99.

152. *Korematsu*, 323 U.S. at 226 (Roberts, J., dissenting).

153. *Id.* at 229.

154. *Id.* at 218-19, 223-24.

war powers unconstitutional. The Court decided *Hamdi*, a war powers case, in this context and history of deference.

D. *Hamdi's Assertion of Judicial Power in Context*

The plurality's assertion of judicial power breaks from the Court's traditional deference to the President's use of the war powers. *Hamdi* does not seem to indicate on judicial review when the exercise of the war powers infringes on citizens' individual liberties. In this respect, *Hamdi* contradicts the *Prize Cases*' statement that the President alone is entitled to determine what force is necessary to defend the country. Moreover, *Hamdi* contradicts *Korematsu*'s deference to military judgment. Suggesting that the judiciary is empowered to review the President's judgment to the extent it infringes on individual rights goes against that precedent.

Most importantly, *Hamdi*'s broad statements of judicial power—at the expense of the political branches' war powers—are inconsistent with the spirit of the precedent. The jurisprudence favors extreme deference and reluctance to review exercises of the war powers. Rather, the *Hamdi* plurality strongly rejected Justice Thomas's statement that "[t]his detention falls squarely within the Federal Government's war powers, and we lack the expertise and capacity to second-guess that decision."¹⁵⁵

Although the Court breaks from tradition by making statements supporting the use of judicial review, its various holdings defer to the Executive's decision to detain *Hamdi*. The Court's empty assertions of judicial review create a Potemkin village,¹⁵⁶ hiding its actual deference to the President's exercise of the war powers. This Court demonstrated its deference and refusal to challenge the President by interpreting the anti-detention statute broadly, by finding an expansive holding in *Quirin*, and by creating a due process regime that does little to protect the rights of detained citizens.

IV. DEFERENCE BY INTERPRETING THE PRESIDENT'S STATUTORY AUTHORITY BROADLY

The Court first showed deference to the exercise of the war powers by interpreting § 4001(a) broadly. Section 4001(a) states that the government cannot detain a citizen absent a congressional act allowing it to do so. In *Hamdi*, the Court held the open language in the Authorization for Use of Military Force provided the necessary congressional approval to allow the President to detain citizens—a broad

155. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2674 (2004) (Thomas, J., dissenting).

156. "Potemkin village" refers to "any sham or unreal thing." THE NEW SHORTER OXFORD ENGLISH DICTIONARY 2309 (1993). Typically, the term means a type of facade intended to conceal something more complex or "create a false picture of progress and prosperity." 12 THE OXFORD ENGLISH DICTIONARY 222 (2d ed. 1989).

construction of what § 4001(a) requires. However, the statute's legislative history advances a narrow construction of the statute. The legislative history shows that Congress intended § 4001(a) to require specific authorization before the President could detain a citizen. Section 4001(a)'s legislative history not only supports a narrow interpretation, but creates an inference that a narrow interpretation is the statute's only correct construction. In sum, the Court deferred to the Executive's war powers by choosing a broad construction of § 4001(a)'s "act of Congress" requirement over the narrower and arguably better construction that the legislative history supports.

A. The Japanese Internment During World War II

The history of § 4001(a) is inseparable from the federal government's internment of Japanese Americans during World War II. Japanese internment serves as a reference point for ascertaining the congressional intent of § 4001. After Japan attacked Pearl Harbor, the U.S. government placed many restrictions on Japanese Americans.¹⁵⁷ Fearing attacks by disloyal Japanese Americans, President Roosevelt issued Executive Order 9066, giving the military authority to "exclude any persons from designated areas" for national security purposes.¹⁵⁸ As the President anticipated, the military used the order to exclude Japanese Americans from certain areas in the West.¹⁵⁹ A massive resettlement resulted. By early 1942, the government began operating internment camps in the West at the behest of states unwilling to accept displaced Japanese Americans.¹⁶⁰ The government, on the President's direction, held more than 100,000 Japanese Americans in internment camps by mid-1942.¹⁶¹ The Supreme Court upheld the detentions as constitutional exercises of the war powers.¹⁶²

Commentators and historians have heavily criticized the internment.¹⁶³ For example, the Commission on Wartime Relocation and Internment of Civilians criticized the government for interning Japanese Americans without any real evidence of disloyalty and for failing to treat Americans of German and Italian ancestry in the same way.¹⁶⁴ The Commission, writing in 1983, noted the "personal

157. GREG ROBINSON, *BY ORDER OF THE PRESIDENT: FDR AND THE INTERNMENT OF JAPANESE AMERICANS* 74–75 (2001).

158. COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, *PERSONAL JUSTICE DENIED* 49 (1997).

159. *Id.*

160. *Id.* at 10.

161. *Id.* at 12.

162. *See supra* notes 147–54.

163. *See, e.g.*, MICHIE WEGLYN, *YEARS OF INFAMY: THE UNTOLD STORY OF AMERICA'S CONCENTRATION CAMPS 67–75* (1982) (criticizing the federal government's detention of Japanese Americans during World War II).

164. COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, *PERSONAL JUSTICE DENIED* 3 (Civil Liberties Public Education Fund ed. 1997).

injustice of excluding, removing and detaining loyal American citizens is manifest.”¹⁶⁵

B. The Internal Security Act of 1950: § 4001(a)'s Predecessor

Understanding the Internal Security Act of 1950, the law Congress repealed by enacting § 4001(a), begins with a look at that Act's history. The Internal Security Act of 1950 was the product of “a rising wave of intense anticommunism generated by the unsettled relationship between the United States and the U.S.S.R.”¹⁶⁶ Its stated purpose was to prevent Communist infiltration into the United States.¹⁶⁷ The Act, for example, prohibited persons from conspiring to establish a “totalitarian dictatorship” in the United States and prohibited government employees from associating with members of the Communist party—all subject to criminal penalties.¹⁶⁸

Title II of the Act, titled the “Emergency Detention Act of 1950,” gave the President authority to detain any persons reasonably believed to be engaged in espionage or sabotage during an “internal security emergency.”¹⁶⁹ An internal security emergency arose upon an invasion of the United States, a rebellion in the country, or a congressional declaration of war.¹⁷⁰ Thus, the Act gave the President wide authority to detain citizens in a variety of circumstances. The stated purpose was that such authority was necessary to prevent Communist attacks against this country.¹⁷¹ The Act did allow for detainees to receive limited process, including review by a detention board and, following a decision by the board, access to the courts.¹⁷² Congress added these procedural safeguards in an effort to calm public anxiety over “unfettered discretion by the President in a wartime emergency.”¹⁷³ The Internal Security Act, however, provided *de minimis* protection for those the President detained.

The Internal Security Act extended the deference the Supreme Court showed in *Hirabayashi* and *Korematsu* to the President's detention of citizens during national emergencies. The Internal Security Act gave congressional approval to detentions by the Executive based only on a declaration of war, or in other situations at the decision of the President.¹⁷⁴ By choosing to replace the Act in

165. *Id.*

166. Richard Longaker, *Emergency Detention: The Generation Gap, 1950–1971*, 27 W. POL. Q. 395, 395 (1974).

167. Internal Security Act of 1950, Pub. L. No. 831, 64 Stat. 987, 987–89 (1950).

168. *Id.* at 991–92.

169. *Id.* at 1021 (codified as amended at 50 U.S.C. § 813 (1952)).

170. *Id.* (codified at 50 U.S.C. § 812 (1952)).

171. *Id.* at 1019–21 (codified at 50 U.S.C. § 811 (1952)).

172. *Id.* at 1021 (codified at 50 U.S.C. § 813 (1952)).

173. Longaker, *supra* note 166, at 396.

174. *See supra* note 169 and accompanying text.

1971, Congress intended to require something more than a declaration of war to trigger the President's power to detain citizens.

C. § 4001(a)'s Enactment

Congress enacted § 4001(a) to repeal Title II of the Internal Security Act of 1950.¹⁷⁵ A sense of insecurity over the 1950 Act's broad grant of power developed in the country during the 1960s.¹⁷⁶ Memories of the World War II internment, fear among various social groups (specifically African-Americans and anti-war protestors), and the dissipating threat of domestic Communism all contributed to public sentiment favoring the repeal of the 1950 Act.¹⁷⁷ As § 4001(a)'s sponsor stated, the 1950 Act stood "as a barrier to trust between some of our citizens and the Government."¹⁷⁸ The current statute, 18 U.S.C. § 4001(a), became law on September 25, 1971.¹⁷⁹

As noted above, § 4001(a) prevents the President from detaining American citizens absent an act of Congress.¹⁸⁰ Congress considered simply repealing the Emergency Detention Act but feared doing so would leave the President with power to detain citizens as was the case before 1950, leaving "citizens subject to arbitrary executive action."¹⁸¹

Congress intended § 4001(a) to require a specific authorization. The President, under the 1950 Act and prior Supreme Court rulings, already had the power to detain citizens pursuant to a declaration of war. Replacing the 1950 Act would have been unnecessary if Congress intended the President to have the same broad power to detain under § 4001(a). The effect of the Supreme Court interpretation in *Hamdi* is to give the President the same detention power used during World War II—detentions that occurred after a declaration that was no more specific than § 4001(a). By enacting the statute, Congress intended to prevent another World War II-type detention of citizens by the Executive. To serve its stated purpose of preventing World War II-type detentions (which occurred pursuant to a declaration of war), § 4001(a) necessarily has to require a specific authorization to allow detention.

175. S. REP. NO. 92-304, at 1 (1971).

176. Longaker, *supra* note 166, at 400.

177. *Id.*

178. S. REP. NO. 92-304, at 3 (1971).

179. H.R. REP. NO. 92-968, at 125 (1972).

180. *See supra* note 35 and accompanying text.

181. H.R. REP. NO. 92-116, at 5 (1971).

D. The Court's Broad Interpretation of § 4001(a)

The Court found that the Authorization for Use of Military Force's "necessary and appropriate" language satisfied the detention requirement of § 4001(a).¹⁸² The Authorization, however, does not contain the precise language Congress intended to be necessary before the President has power to detain citizens. If, in enacting § 4001(a), Congress replaced the broad authority that the Internal Security Act conferred with something more stringent, as the legislative history indicates, the Authorization is insufficient, because it provides no more specificity than the 1950 Act or *Korematsu* required. However, Congress did seek to impose requirements more stringent than those of the Authorization. The Court contradicted its assertions of judicial power and showed deference to the President by choosing to broadly interpret § 4001(a), rather than adopting the narrow, more plausible construction that the legislative history supported.

V. DEFERENCE BY ALLOWING THE EXECUTIVE TO DETAIN CITIZENS INDEFINITELY AS ENEMY COMBATANTS

While making its broad assertions supporting judicial review, the Court held the President can indefinitely detain citizens as enemy combatants. The Court relied almost solely on *Ex parte Quirin* in reaching this holding. It chose to interpret the case and its precedential value broadly. A narrower and equally plausible interpretation of *Quirin* was available to the Court, as Justice Scalia argued in his dissent. However, the Court chose to defer to the President rather than exercise the judicial power it appeared to support.

A. The Precedent Establishes a Rule of Non-Detention for Citizens

In his dissent, Justice Scalia argued the government had been allowed to deal with citizen combatants in only two ways: 1) suspension of the writ of habeas corpus or 2) criminal charges.¹⁸³ As he noted, the ability to suspend the writ of habeas corpus and to level criminal charges against citizens engaged in hostility against the United States dates at least to the nation's founding.¹⁸⁴ Scalia also cited three cases from the War of 1812 supporting the military's inability to indefinitely detain citizens.¹⁸⁵ However, the case providing the most relevant precedent is *Ex parte Milligan*.¹⁸⁶

Milligan involved a military commission's sentence of death upon an American citizen—a resident of Indiana—for conspiring against the United States and aiding

182. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2641 (2004).

183. *Id.* at 2665–66 (Scalia, J., dissenting).

184. *Id.* at 2666.

185. *Id.* at 2667.

186. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

the Southern rebellion during the Civil War. The Court stated the “laws and usages of war” do not apply to citizens where civilian courts are open and available to punish the person.¹⁸⁷ The Constitution, according to the Court, protects certain rights and “[n]ot one of these safeguards can the President, or Congress, or the Judiciary disturb”¹⁸⁸ Under *Milligan*, a citizen must be tried in a civilian court and detained pursuant to its power, because the military, Congress, and the Executive lack the authority to subject a citizen to their own will—even in a time of war.¹⁸⁹

Yaser Hamdi is similar to the petitioner in *Milligan* in that he was a citizen detained where the civilian courts were open, the President restrained his freedom, and he was subject only to the military’s judgment. As Justice Scalia stated, *Milligan* is not directly on point with *Hamdi*, but applies by analogy. The government justified Hamdi’s detention on the “laws of war,” and the laws of war do not, under *Milligan*, apply to citizens when the civilian courts are available.¹⁹⁰ As late as 1957, *Reid v. Covert* stated *Milligan* was part of “the deeply rooted and ancient opposition in this country to the extension of military control over civilians [including citizens].”¹⁹¹ *Reid* also held that a citizen who is not a member of the United States military cannot constitutionally be subjected to the judgments of the military.¹⁹²

B. Hamdi’s Deferential Interpretation of *Quirin*

As stated above, *Hamdi*’s grant of power to detain citizens indefinitely rested almost solely on *Quirin*. Justice Scalia criticized the plurality for mistakenly relying on *Quirin*.¹⁹³ He first argued *Quirin* did not apply, because it mistakenly found the petitioner in *Milligan* was not an “enemy belligerent” as defined by the laws of war.¹⁹⁴ *Milligan*, Scalia argued, applied to all citizens, regardless of their classification by the laws of war.¹⁹⁵ Second, he argued *Quirin* did not apply, because the petitioner’s status as a member of the enemy force was undisputed,

187. *Id.* at 121.

188. *Id.* at 125.

189. *See id.* at 121–22.

190. *Hamdi*, 124 S. Ct. at 2668 (Scalia, J., dissenting).

191. *Reid v. Covert*, 354 U.S. 1, 33 (1957). A possible argument asserts that Hamdi was not a civilian within the Court’s use of the term, because the government alleged he was in an enemy’s military. However, the government never proved Hamdi was a member of any military force. Additionally, the Court in *Reid* favorably cited *Milligan*, where the petitioner was arguably part of the Confederate military, yet the Court still applied a civilian court requirement to him. *Id.* at 33; *Milligan*, 71 U.S. (4 Wall.) at 121–22. A logical interpretation of the *Reid* Court’s use of the term “civilian” is that the reference applied to citizens who were not part of the United States armed forces, even if they were part of an enemy military force.

192. *Reid*, 354 U.S. at 39.

193. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2669 (2004) (Scalia, J., dissenting).

194. *Id.*

195. *Id.*

unlike Hamdi's enemy combatant classification.¹⁹⁶ Overall, Justice Scalia took a very narrow approach to *Quirin's* applicability to Hamdi's detention and the President's detention of citizens in general. He preferred, instead, to rely on *Milligan*.

Justice O'Connor, writing for the plurality, viewed *Quirin* in much broader terms. She stated *Quirin* "both postdates and clarifies *Milligan*."¹⁹⁷ The fact that the petitioner's classification in *Quirin* was undisputed does not matter, because it still supports detention upon proof of the citizen's enemy combatant status.¹⁹⁸ The plurality adopted a broad view of *Quirin*, paying little attention to the nuances and instead emphasizing the case's broader propositions.

The Court again showed great deference to the President by adopting the broader interpretation of *Quirin*. Justices Scalia and O'Connor argued legitimate reasons for discarding and utilizing *Quirin* as precedent. Justice Scalia took a much narrower view of the case, which would have resulted in denying the President authority to detain citizens pursuant to the war powers. The precedent, other than *Quirin*, supports this conclusion. The practical effect of viewing *Quirin* broadly was to grant the President power to detain citizens indefinitely, at least if they are proven to be enemy combatants. On the issue of constitutional authority to detain citizens, the Court adopted a stance that deferred to the President in contradiction to its strong statements in support of judicial review. The Court had a choice between the narrow interpretation that Justice Scalia offered and that a strict reading of *Quirin* supported, and the broad interpretation that it actually adopted. By choosing the latter, the Court again demonstrated deference in the practicalities of its decision despite its remarks on judicial power and review.

VI. A DEFERENTIAL DUE PROCESS REGIME

The Court provided guidelines for a due process regime that strongly favors the government and placed citizens seeking to challenge their classification as enemy combatants at a disadvantage. The due process available to citizens challenging their status is especially important, because the Executive must show that classification as an enemy combatant is appropriate before the power to detain them indefinitely arises. In providing a nominal due process regime, the Court established only a minor impediment to the President's power to detain. The Court would have provided much more if it were truly concerned with reversing the traditional deference to the Executive's use of the war powers, as its statements favoring judicial review appeared to advocate. Again, the Court deferred to the Executive by essentially adopting the President's classification of a citizen as an

196. *Id.* at 2670.

197. *Id.* at 2643.

198. *Id.*

enemy combatant. The due process guidelines the Court provided surely do not pose much of a challenge to that classification.

A. *The Court's Reasoning and Due Process Guidelines*

The plurality based its due process regime on a balance between Hamdi's interest in his individual rights and the government's interest, which included the burden of providing due process.¹⁹⁹ The resulting due process requirement is a compromise between the process each party argued was appropriate.²⁰⁰ The citizen seeking to challenge his classification is therefore entitled to "receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."²⁰¹ More concrete procedures counter the vague guidelines and work required to accommodate the government's interest. Such accommodations include the ability to admit hearsay, a presumption in favor of the government's evidence, and a determination of the citizen's classification before a military tribunal.

1. *Hearsay*

Hearsay, according to the Court, may "be accepted as the most reliable available evidence from the Government"²⁰² The government asserted too many impracticabilities would be associated with providing evidence of Hamdi's capture "half-way around the globe in Afghanistan."²⁰³ The court presumably decided to allow hearsay in order to relieve this burden. However, the Supreme Court previously stated in *Ellicott v. Pearl* that hearsay is disfavored, because it is not given under oath, the opportunity to confront the witness is lost, and the possibility of fraud is greater.²⁰⁴

The policy reasons in *Ellicott* are as sound today as when the Court decided that case in 1836. Indeed, a defendant's right to confront witnesses is "fundamental" and guaranteed by the Constitution.²⁰⁵ By allowing the admission of hearsay, the Court removes an important due process protection. The government, for example, could admit the Mobbs Declaration, and Hamdi would have no opportunity to cross-examine those persons having personal knowledge of his capture. Allowing hearsay therefore permits the government to introduce evidence that is difficult, if not

199. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2648 (2004).

200. *Id.*

201. *Id.*

202. *Id.* at 2649.

203. Brief for the Respondents at 48–49, *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004) (No. 03–6696).

204. *Ellicott v. Pearl*, 35 U.S. (10 Pet.) 412, 436 (1836).

205. U.S. CONST. amend. VI; *Kirby v. United States*, 174 U.S. 47, 55–56 (1899).

impossible, for the detainee to rebut. Detainees' lack of access to evidence and witnesses also intensifies the difficulty they encounter in rebutting hearsay.

2. *A Presumption in Favor of the Government's Evidence*

According to the Court, establishing a presumption in favor of the government's evidence is permissible.²⁰⁶ A traditional presumption allows for the assumption that a particular fact exists based on the establishment of another fact.²⁰⁷ Thus, a party meets the burden of production once a presumption allows the trier of fact to infer the presumed fact's existence.²⁰⁸ In addition to satisfying a party's burden of production, a traditional presumption also shifts the burden of production to the other party.²⁰⁹ The onus is on the opposing party to present sufficient evidence to rebut the presumption.²¹⁰ Presumptions are often necessary to handicap a party with superior access to evidence or in cases where a party has particular knowledge of the facts and should consequently bear the burden of proving them.²¹¹ Additionally, presumptions are employed against parties with disfavored contentions or when one party is claiming the existence of an unusual fact and should therefore bear the risk of failing to meet the burden of production.²¹²

Allowing presumptions in favor of the government's evidence in detainee classification hearings would serve to disadvantage the citizen-detainees. The detainee would be required to rebut the government's evidence despite having less access to the evidence. A detainee would therefore be required to produce evidence from a far-away battlefield while the government must only produce enough evidence that creates a presumption of the detainee's enemy combatant status. The detainee's burden is also heightened, because hearsay is available as a basis for establishing a presumed fact. Additionally, none of the policy reasons for employing presumptions apply to this case. The detainee does not have superior access to the evidence and does not have peculiar knowledge of the facts. Furthermore, the government has the disfavored contention because of the important liberty interests at stake when it seeks to detain citizens indefinitely as enemy combatants.

3. *Military Tribunals*

The plurality suggested the possible use of military tribunals to conduct the habeas corpus proceedings. "There remains the possibility," O'Connor wrote, "that

206. *Hamdi*, 124 S. Ct. at 2649.

207. BLACK'S LAW DICTIONARY 1203 (7th ed. 1999).

208. 2 JOHN W. STRONG, MCCORMICK ON EVIDENCE § 342 (5th ed. 1999).

209. *Id.*

210. *Id.* § 344.

211. *Id.* §§ 337, 343.

212. *Id.*

the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal.”²¹³ The Court noted that military tribunals already go through similar proceedings when alien detainees want to be classified as prisoners-of-war for Geneva Convention purposes.²¹⁴ However, military tribunals do not adequately protect individual liberties. The Court has noted that military tribunals provide fewer “constitutional safeguards” than Article III courts.²¹⁵ For example, the Court criticized military tribunals in *Milligan* as means for the government to circumvent rights that the Fourth, Fifth, and Sixth Amendments guarantee.²¹⁶ In *Reid*, the Supreme Court expressed concern about injustice in military courts resulting from “command influence” and their failure to follow constitutional safeguards.²¹⁷ The military courts are also not appropriate for non-military personnel, because they emphasize military necessity over individual rights.²¹⁸

Concerns over the tribunals’ adequacy become more important when the Executive already demonstrates a preference for national security over individual liberty, particularly when military tribunals, as the Court noted in *Reid*, are predisposed to favoring the military interests over individual interests.²¹⁹ Their predisposition and the Executive’s willingness to disregard civil rights in the current war could present a major problem for citizen-detainees. The *Hamdi* Court, in choosing a military tribunal over the constitutional protections that civilian courts more fully guarantee, demonstrated its reluctance to challenge the Executive’s enemy combatant classification.

B. The Due Process Regime’s Practical Effect

The Court, by allowing hearsay, presumptions, and military tribunals, set up a due process regime that strongly favors the government. Under this regime, the detainee seeking to challenge his classification is at a distinct disadvantage. Also important to note, the Court said that courts and tribunals may have to adjust their proceedings “to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict.”²²⁰ Thus, the Court gave tribunals discretion to decide what due process requires, making it possible for a petitioner to face an even stronger disadvantage. In sum, the Court-created due process regime provides only nominal protection to the petitioner and eases the Executive’s ability to classify a citizen as an enemy combatant. The Court again demonstrated deference to the

213. *Id.*

214. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2651 (2004).

215. *Toth v. Quarles*, 350 U.S. 11, 15 (1955).

216. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 119–20 (1866).

217. *Reid v. Covert*, 354 U.S. 1, 36, 39 (1957).

218. *Id.* at 39.

219. *Id.*

220. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2649 (2004).

Executive's exercise of the war powers by hesitating to review the President's enemy combatant classification.

VII. CONCLUSION

One of a citizen's most important rights is to remain free from arbitrary imprisonment by the government. In *Hamdi*, the Court announced its ability to review the Executive's use of the war powers to detain citizens. In doing so, it made broad, sweeping statements about the Judiciary's power to safeguard individual liberties, even in a time of war. However, the practical effects of the Court's decision, particularly a broad interpretation of the detention statute, a broad interpretation of *Quirin*, and a due process regime favoring the government, do not substantially impair the President's ability to detain citizens. The Court's statements supporting judicial review act as a mask, hiding the broad authority that the Executive possesses and that the Court reinforced.²²¹

221. *Hamdi* is the foundation for two civil cases currently pending in the South Carolina Federal District Court, *Padilla v. Hanft*, No. 2:04-2221-26AJ (D.S.C. filed July 2, 2004) and *Al-Marri v. Hanft*, No. 2:04-2257-26AJ (D.S.C. filed July 8, 2004). The petitioners in both cases are seeking writs of habeas corpus, arguing, *inter alia*, that their detention without due process is unconstitutional. Petition for Writ of Habeas Corpus at 5–6, *Padilla* (No. 2:04-2221-26AJ); Petition for Writ of Habeas Corpus at 11–12, *Al-Marri* (No. 2:04-2257-26AJ). Both petitioners are also challenging their classifications as "enemy combatants." *Id.* While *Hamdi*'s applicability to *Al-Marri* will probably be limited, because the petitioner is a non-citizen, the petitioner in *Padilla* is a citizen. Petition for Writ of Habeas Corpus at 1, *Padilla* (No. 2:04-2221-26AJ); Petition for Writ of Habeas Corpus at 1, *Al-Marri* (No. 2:04-2257-26AJ). *Padilla* is a refiling of a case the Supreme Court decided in 2004. *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004). In both cases, the government relies on *Hamdi* as precedent to justify the detentions. See Respondent's Answer to the Petition for Writ of Habeas Corpus, *Padilla* (No. 2:04-2221-26AJ); Respondent's Answer to the Petition for Writ of Habeas Corpus, *Al-Marri* (No. 2:04-2257-26AJ).

The *Hamdi* Court's deferential attitude toward the Executive's classification and detention of "enemy combatants" will be especially important in *Padilla*, *Al-Marri*, and those cases that will inevitably follow. *Hamdi*'s failure to exercise meaningful judicial review and its deference to the Executive may foreshadow later decisions. However, *Hamdi*'s statements supporting judicial review could serve as a building block for future assertions of judicial power.

At least one district court is willing to exercise judicial review in the wake of *Hamdi* to question the President's handling of terrorism detentions. In *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. 2004), the District of Columbia District Court rejected the President's determination that the Geneva Convention does not apply to enemy combatants. *Id.* at 160. Hamdan is a Yemeni citizen being held at Guantanamo Bay, Cuba. *Id.* at 165 n.11. He was captured during military operations in Afghanistan in 2001 and charged with conspiracy to commit terrorism and other terrorism-related acts. *Id.* at 55. The President determined that Hamdan was eligible to be tried by a military commission, and the military began the process of trying him accordingly. *Id.* Citing *Quirin* and the Uniform Code of Military Justice, the court held that the President's military commissions must conform to the Third Geneva Convention. *Id.* at 158–60. Therefore, detainees are entitled to the same rights as prisoners-of-war unless convicted of war crimes by the same courts-martial with jurisdiction over members of the United States Military. *Hamdan v. Rumsfeld*, F. Supp. 2d 152, 161 (D.D.C. 2004).

The court refused to show deference towards the President and, instead, found that the detainees are entitled to the protections of the Third Geneva Convention. The government argued courts could

not review the President's finding that the Third Geneva Convention does not apply, because Hamdan was not captured during the Afghan War, but during "a 'separate' conflict with Al Qaeda." *Id.* at 160. The district court exercised judicial review of the President's determination and held that the Geneva Conventions were "triggered by the place of the conflict, and not by what particular faction a fighter is associated with." *Id.* at 161. The government also argued that a tribunal found Hamdan was not a "prisoner-of-war" within the Convention's definition. *Id.* at 161–62. The district court also rejected this argument, finding that "[t]he President is not a 'tribunal . . .'" *Id.* at *8. According to the court, the government must establish "a competent tribunal" to determine Hamdan's prisoner-of-war status. *Id.* The court also rebuffed the government's argument that the Convention did not create a private right of action. *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 163–65 (D.D.C. 2004). Finally, the district court held the military commission established by the President did not comply with the Convention, because it offered far fewer protections than courts-martial. *Id.* at 166–68.

Hamdan demonstrates that some courts are willing to exercise judicial review over the President's use of his war powers in the wake of *Hamdi*. While *Hamdan* refers to *Hamdi* only sparingly, *see id.* at 162, the Supreme Court's strong statements supporting judicial power must have bolstered the district court's willingness to use judicial review. The fate of the district court's decision in *Hamdan* on appeal remains unclear. *See* Guy Taylor, *U.S. to Defend Use of Guantanamo War Tribunals*, WASH. TIMES, Nov. 10, 2004, at A03.